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No. 808

In the Supreme Court of the United States

OCTOBER TERM, 1959

CERTAIN INTERESTS IN PROPERTY IN CHAMPAIGN COUNTY, STATE OF ILLINOIS; CHANUTE GARDENS CORPORATION AND CHANUTE APARTMENTS CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1A-9A) is reported at 271 F.2d 379. The opinion of the District Court (Pet. App. 10A-24A) is reported at 165 F.Supp. 474.

JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1959. A timely motion for rehearing by the petitioners was denied on November 24, 1959. On January 29, 1960, Mr. Justice Clark granted an

order extending the time within which to petition for a writ of certiorari to March 22, 1960, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this federal eminent domain proceeding is governed by federal law, rather than by state law.

2. Whether the measure of just compensation should be based upon the fair market value of the interests condemned rather than upon the reproduction cost of the federally-owned buildings involved.

STATEMENT

This action was brought by the United States to condemn the petitioners' leasehold interests, subject to the interests of the mortgagee, in two housing projects which were constructed under the terms of the so-called Wherry Act (Act of August 8, 1949, 63 Stat. 570, 12 U.S.C. 1748 *et seq.*). The projects were located on the Chanute Air Force Base at Rantoul, Illinois.

Both projects were built by the Jonathan Woodner Company as sponsor and organizer of petitioner corporations. The declaration of taking was filed on May 1, 1957. As of that date, each leasehold was encumbered by a mortgage owned by the New York State Employee's Retirement System and guaranteed by the Federal Housing Administration. There was also an outstanding loan made by the Air Force to the builder to enable it to complete the projects. It was stipulated that as of the date of taking there was a total balance due on the mortgages of $6,145,694.31, and a balance due on the Air Force loan of $410,771.26, subject to any credits

and offsets in favor of the petitioners. It was also stipulated that construction, completed in 1953, cost $8,297,969.23, exclusive of builder's and architect's fees.

Trial by jury was waived. Both parties offered considerable valuation testimony and the premises were viewed by the court. As indicated in the opinion of the District Court, its award of $7,100,000.00 (from which the indebtedness secured by the mortgages and the Air Force loan was to be deducted on distribution) was within the range of the evidence (Pet. App. 22A, 24A):

> The court finds from all the competent evidence that the fair cash market value with a buyer willing to buy and a seller willing to sell varies from Dunn's estimate of $6,673,552.31 to Roe's estimate of $8,685,914.00. Kuehnle fixes a cash market value of $6,755,694.31. The court in arriving at these figures has added the mortgage indebtedness to the values estimated by Dunn and Kuehnle for the defendants' [petitioners'] "equity". The court has deducted from Roe's estimate of market value $58,000.00 which he improperly included for laundry facilities.

The trial court also ruled that the United States could not condemn the leasehold interests subject to the mortgages, reasoning that a leasehold interest subject to a mortgage is not a recognized legal estate under the law of Illinois (Pet. App. 18A-19A). Accordingly, the court concluded that the mortgage indebtedness was not to be considered in arriving at the valuation of the property, but taken into account only in making distribution (Pet. App. 18A-20A). A

judgment was thereafter entered in favor of the petitioners in the amount of $7,100,000.00, "which said sum includes the amounts due on the mortgages and the Air Force loan, said sum of $7,100,000.00 to bear interest as provided by the Declaration of Taking Act (40 U.S.C.A. 258a-e)" (Def. App. 349a).[1]

Petitioners filed notices of appeal "confined to the inadequacy of the total sum of $7,100,000.00 adjudged to be just compensation" (Def. App. 363a, 365a). The United States made no challenge to the overall valuation but cross-appealed from the determination that "the United States was [not] empowered to condemn defendants' [petitioners'] interests subject to outstanding mortgages" (Pet. App. 1A)—an issue which bears on the amount of interest due petitioners.

With respect to petitioners' appeal, which challenged the adequacy of the award, the Court of Appeals affirmed the judgment of the District Court, holding that there was "more than ample competent evidence to support the award of $7,100,000" (Pet. App. 3A). On the government's appeal, the Court of Appeals reversed, holding that "the United States can condemn a leasehold interest subject to an existing mortgage lien thereon, and that the district court erred in applying Illinois law to the contrary" (Pet. App. 9A). As the opinion below points out (Pet. App. 5A-6A), that ruling prevented a windfall to defendants of $148,843.57—one which resulted under the

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[1] "Def. App." references are to the "Appendix for Defendants-Appellants-Appellees" filed in the Court of Appeals. References to the "Appendix for Plaintiff-Appellee-Appellant" will be shown as "Pl. App.".

District Court's judgment because of the difference between the interest rate on the mortgages and that provided in the Declaration of Taking Act.[2]

ARGUMENT

1. This Court has recently observed that the exercise of the condemnation power in federal eminent domain cases is governed by federal law. *United States* v. *93.970 Acres of Land,* 360 U.S. 328. The Court has also made clear that the eminent domain power of the sovereign "is addressed to every sort of interest the citizen may possess." *United States* v. *General Motors Corp.,* 323 U.S. 373, 378. Thus, the court below correctly ruled that there is no obstacle to a taking of the Wherry sponsors' interest subject to the mortgage. As the Court of Appeals also indicated (Pet. App. 7A-8A), there is evidence that Congress contemplated use of this procedure.

Petitioners suggest that under the government's theory they might be left "liable for payment" on the mortgages (Pet. 31, 32, 33). There is hardly room for any such objection. By instrument dated April 14, 1958, filed July 15, 1958, the mortgagee expressly released petitioners "from any and all liability for payment of the mortgage notes and indebtedness secured by the aforesaid mortgages" (Pl. App. 91).[3]

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[2] The mortgage holders are only entitled to 4% interest to the date of payment, whereas the District Court's judgment required the United States to pay 6% interest on the amount of mortgage balances from the date of taking.

[3] The United States, acting through the Department of the Air Force, has assumed and agreed to pay the mortgage indebtedness under tri-party agreements (one of which is printed at Def. App. 354a-359a), entered into between the Department of the Air Force,

2. The remaining contentions of petitioners relate to their claim that the valuation was too low.[4] The relevant considerations are largely factual and we believe that there is no occasion to depart from the ordinary two-court rule. Although petitioners argue that reproduction cost less depreciation should measure just compensation, their witnesses took no such position at the trial; they testified, *inter alia*, to original cost and capitalization of rentals (Pet. App. 21A-23A). In all events, the argument lacks merit.

The courts are in agreement that reproduction cost less depreciation is the least reliable indicium of market value. Both Courts of Appeals in which Wherry housing cases have been considered to date have so expressed themselves. Thus the court below stated (Pet. App. 4A):

> Defendants' [petitioners'] contention that the district court should be confined to a consideration of reproduction cost less depreciation is not well taken in this case, and such method generally is held to be one of the least reliable indicia of market value. * * *

The Court of Appeals for the Fifth Circuit has recently reversed and remanded a Wherry housing case

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the Federal Housing Administration as guarantor, and the mortgagee, the New York State Employees' Retirement System. By virtue of these agreements, the Air Force has been making payments of principal and interest on the mortgage indebtedness from May 1, 1957, the date of taking in the condemnation case.

[4] It is true, as petitioners note, that a number of Wherry Act cases are pending. Also, it is likely that one or more of these cases may raise issues of general importance. But it does not follow that this case is in that category.

on the ground that it was not proper to rely upon evidence of reproduction cost less depreciation. *United States v. Benning Housing Corp.*, C.A. 5, No. 17726, decided March 25, 1960, Appendix, *infra*, pp. 10-20. The same view has been widely expressed in other (non-Wherry housing) cases.[5]

Moreover, as the Court of Appeals points out in the *Benning* case, reproduction cost evidence ought not be considered in any instance without "a showing that substantial reproduction would be a reasonable business venture" (App., *infra*, p. 14). In the instant case, the testimony of witnesses on both sides was that no prudent person would invest the cost of reproduction of the projects, less depreciation (Def. App. 73a, 113a-114a; Pl. App. 55-56; cf. Pet. 25). As the District Court pointed out in its opinion (Pet. App. 15A, 16A), the valuation witnesses for the respondent rejected reproduction cost evidence as being representative of market value.

A further reason why reproduction cost evidence is inappropriate in Wherry Act cases is that those who operate Wherry projects have interests so limited and restricted that they cannot be compared to the usual unrestricted leasehold carved out of a fee. Because of

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[5] *E. g.*, *United States* v. *49,375 Square Feet of Land, etc.*, 92 F. Supp. 384, 388 (S.D. N.Y.), affirmed *sub nom. United States* v. *Tishman Realty & Const. Co.*, 193 F. 2d 180 (C.A. 2), certiorari denied, 343 U. S. 928; *United States* v. *44.00 Acres of Land, Etc.*, 234 F. 2d 410, 414 (C.A. 2); *Carlström* v. *United States*, C.A. 9, No. 16,128, decided Feb. 15, 1960, affirming *United States* v. *70.39 Acres of Land*, 164 F. Supp. 451, 488 (S.D. Cal.); *United States* v. *Savannah Shipyards*, 139 F. 2d 953, 956 (C.A. 5); *Jacksonville and Southeastern Ry. Co.* v. *Walsh*, 106 Ill. 253, 256-257; *Forest Preserve District* v. *Chilvers*, 344 Ill. 573, 578, 176 N. E. 720, 722.

the purpose of the Wherry Act to provide housing at rentals military personnel could afford to pay (the *quid pro quo* received by the government (App., *infra*, p. 18)) and because of the extraordinarily high percentage of the cost insured by the federal government, unusual restrictions and limitations were provided with respect to Wherry Act housing. See *Offutt Housing Co.* v. *Sarpy County*, 351 U.S. 253, and *United States* v. *Benning Housing Corp., et al.* (C.A. 5, No. 17726, decided March 25, 1960, Appendix, *infra*, pp. 10-20. As stated in the *Benning* case, "It is clear that the policy has consistently been one of allowing a return based upon original cost rather than reproduction. Rent increases were sanctioned only to offset rising operating costs and not to compensate for increased reproduction costs."[8]

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[8] The statement in the *Benning* case, that "The Act did not contemplate that sponsors would recover reproduction cost on a sharply rising market," can be fully documented. This is the answer to the claim that there is a conflict between the executive, legislative and judicial departments (Pet. 13), as well as to the assertions that Congress has determined that application of the usual rule of fair market value would be "improper and grossly unfair" (Pet. 12). The formula, setting a ceiling for a negotiated price, was expressly inapplicable if condemnation became necessary. Act of August 7, 1956, 70 Stat. 1091, 1111; H. Rept. No. 2363, 84th Cong., 2d Sess., 1956, pp. 45, 68; 102 Cong. Rec., pt. 11, p. 14468 (1956); S. Rept. No. 231, 85th Cong., 1st Sess. (1957), p. 23. The House Report says: "Your Committee desires to make it most clear that neither the Secretary of Defense, or his designee, nor the lessee are required to accept the price determined by the Commissioner under the formula contained in subsection (c) of the bill. If such price is rejected by either party it is expected that the Secretary of Defense, or his designee will proceed to acquire such project(s) through condemnation."

In view of petitioner's comment concerning the filing of a declaration of taking "without having made any offer for negotiations"

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1960.

(Pet. 8), we note that, as a consequence of a tax ruling by officers of Champaign County and other developments, the United States decided to acquire the projects through condemnation as permitted by the Act of August 11, 1955, 69 Stat. 635, 652. The record is plain that representatives of the petitioners concurred in that decision, if in fact they did not suggest it (Pl. App. 66-68). Petitioners do not attack the taking for any alleged failure to conform to the requirements of the Act of August 7, 1956, 70 Stat. 1091, 1111.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17726

UNITED STATES OF AMERICA, APPELLANT,

versus

BENNING HOUSING CORPORATION, ET AL., AND UNKNOWN OWNERS, APPELLEES

Appeal from the United States District Court for the Middle District of Georgia

(March 25, 1960.)

Before RIVES, Chief Judge, and TUTTLE and JONES, Circuit Judges.

RIVES, Chief Judge: This is a proceeding to establish just compensation for two "Wherry" housing projects condemned by the United States. The condemnees, Custer Road Terrace, Inc., and Benning Housing Corporation—corporations formed according to the requirements of the Wherry Act[1] expressly for the purpose of managing these projects—are beneficially owned by identical persons, thus making it possible to dispose of the case by one all-inclusive valuation.

The property condemned comprised leasehold estates in approximately 300 acres of land situated within the confines of Fort Benning, Georgia, together with the improvements thereon. Two separate seventy-five-year leases are involved: one, executed on March 3, 1950, and having approximately sixty-seven

[1] 63 Stat. 570 (1949), 12 U.S.C.A. §§1748, et seq.

and one-fourth years remaining as of December 31, 1957, the date of taking; and the second, executed on September 6, 1951, and having approximately sixty-eight and two-thirds years remaining as of that date. The improvements involved were quite substantial. Roughly speaking, they consisted of 370 brick residential buildings containing 800 family dwelling units, a commercial shopping center, various utility buildings, a network of paved streets and sidewalks, and complete water and sewage systems. Under the terms of the leases, titles to all improvements remained in the lessees and, upon expiration of the leases, the lessees had the privilege of removing those improvements. Any improvements not removed at that time, however, became the property of the United States.

The primary controversy at the trial centered about the method of valuation which was to be used in the determination of just compensation. The condemnees took the position that the proper measure of compensation for their interests was reproduction cost less depreciation. This position was predicated upon three contentions: that there was no established market and, consequently, no established market value for their property; that valuation by capitalization of income was inappropriate; and that the nature of the property condemned was such that the reproduction cost approach was peculiarly appropriate. The Government, on the other hand, took issue with each of these contentions. It offered, as evidence of market value, testimony relating to the sale of three Wherry housing projects,[2] and contended that these projects were comparable to those of the condemnees. Secondly, it contended that valuation by capitalization of income was

[2] The sales urged as comparable were those of Wherry housing projects at Barksdale, Louisiana, Quantico, Virginia, and Fort Devins, Massachusetts.

entirely appropriate to the property condemned. And, finally, it contended that the reproduction cost approach was entirely inappropriate and that evidence of reproduction cost should be excluded.

The district judge heard evidence relating to the alleged comparable sales at a special hearing prior to the trial and ruled that the sales were sufficiently comparable to warrant their admission into evidence. At the same time, however, he ruled that evidence of capitalization of income and reproduction cost was also admissible. Thus, the jury to which the case was eventually tried heard evidence relating to all three of these methods of valuation. A verdict was returned in favor of the condemnees in the amount of $2,171,487.[3] Since the Government had deposited only $941,000 prior to the trial, judgment was entered ordering payment of an additional $1,230,487 plus interest thereon from the date of taking.

The Government prosecutes this appeal, assigning as the primary ground therefor, the trial court's ruling that the jury could hear evidence of reproduction cost of the condemned property. Additional assignments relate to rulings made by the trial court on related, but comparatively incidental, questions.

An examination of the cases dealing with the admissibility of reproduction cost evidence reveals that, although the subject is clouded with considerable uncertainty, some pattern does emerge. Thus, it has almost uniformly been held that, absent some special showing, reproduction cost evidence is not admissible

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[3] This verdict was based upon the implied finding that the value of the projects was $8,135,492.53 for, by the terms of the taking, the United States assumed the balance of the mortgages on the projects in the amount of $5,964,005.53. For a discussion of the power of the United States to condemn a leasehold interest subject to a mortgage, see United States v. Certain Interests in Property, 7 Cir., 1959, 271 F.2d 379, 382-84.

in a condemnation proceeding.[4] This rule stems from a recognition of the fact that reproduction cost evidence almost invariably[5] tends to inflate valuation. This is so because the reproduction cost of a structure sets an absolute ceiling on the market price of that structure,[6] a ceiling which may not be, and most frequently is not, even approached in actual market negotiations. When this inherently inflationary attribute of reproduction cost evidence is considered in the light of the misleading exactitude which such evidence almost inevitably imparts to a jury unsophisticated in the niceties of economics, the justification for placing substantial safeguards upon its admission is apparent.

On the other hand, it is equally well recognized that in some cases, and upon a proper showing, the admission of reproduction cost evidence is justified, and even mandatory. Within this area of substantial agreement, there is, however, some disagreement. Thus, some courts hold that reproduction cost evidence is admissible only in those cases where the indicia of value under other methods are not available.[7] Other courts seem to treat this factor as largely irrelevant.[8] But, as to three other factors governing the admission of reproduction cost evidence, there is substantial, if not complete, unanimity. These are: (1) that the interest condemned must be one of complete ownership;[9] (2) that there must be a showing

[4] See generally, 2 Orgel, Valuation Under Eminent Domain §§188-199 (2nd ed., 1953).

[5] Id., at §188.

[6] Id., at §192.

[7] See, e.g., United States v. 2.4 Acres of Land, 7 Cir., 1943, 138 F. 2d 295.

[8] See, e.g., United States v. Wise, 4 Cir., 1942, 131 F. 2d 851.

[9] This follows naturally from the fact that reproduction cost is related to the value of the whole, if, indeed, it is related to value at all. Messer v. United States, 5 Cir., 1946, 157 F. 2d 793, provides

that substantial reproduction would be a reasonable business venture;[10] (3) that a proper allowance be made for depreciation.[11]

We will first deal with the Government's contention that reproduction cost evidence was not admissible because other indicia of value, i.e., comparable sales and income, were available. On this point, the Government relies upon the opinions of this Court in *Stephenson Brick Co.* v. *United States*[12] and *United States* v. *Savannah Shipyards*,[13] contending that these cases commit this Court to the view that reproduction cost evidence is not admissible where comparable sales evidence is available and are, therefore, entirely dispositive of the issue here presented.

An examination of those cases, however, reveals that this reliance is misplaced. The very most that they can properly be interpreted to stand for, and, indeed, even this is by way of dictum, is the proposition that where there is an established market value for the condemned property, reproduction cost evidence is inadmissible. The distinction which must be drawn is between a situation in which there is an established market value and one in which a few sales of comparable properties have occurred. In the latter situation,

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an ideal example of the sort of case reproduction cost could never be admitted. In that case, the condemnee was a mere licensee upon the lands condemned and was under an obligation to remove his improvements upon notice of termination of his license. This burden upon his right to free enjoyment of his structures detracted from the value of those structures to such an extent that, for that reason alone, the absence of any reasonably close relationship between value and reproduction cost was apparent.

[10] See United States v. Wise, supra, n. 8; 2 Orgel, op.cit. supra, n. 4, at § 196.

[11] See In re United States Commission to Appraise Washington Market Co. Property, D.C. Cir., 1923, 295 Fed. 950; 2 Orgel, op. cit. supra, n. 4, at §§ 196-97.

[12] 5 Cir., 1940, 110 F. 2d 360.

[13] 5 Cir., 1944, 139 F. 2d 953, reh. denied 140 F. 2d 863.

which is that involved in the present case, it cannot be said that a market value is established.[14] Isolated comparable sales, though themselves admissible as tending to show fair market value, are not sufficient to render reproduction cost evidence inadmissible in a case where admission is otherwise appropriate.

Thus, even if we assume that the dicta in *Stephenson Brick* and *Savannah Shipyards* accurately state the law of this Circuit with regard to the admissibility of reproduction cost evidence where a market value is established, the rule has no application here. Where a market value is not established, it is the primary responsibility of the trial court to determine whether reproduction cost evidence should be admitted as an aid to valuation. Here, the trial court ruled that it should and we cannot say that that decision was an abuse of discretion.

The Government's second contention raises a more serious difficulty. That contention, i.e., that reproduction cost evidence was inadmissible, because the condemnees' interest did not constitute complete ownership, is rested upon two separate grounds: first, that the Government was the real owner subject only to condemnees' leasehold; and, secondly, that condemnees' rights with respect to the property were limited by the fact that the projects were subject to rent control by the F.H.A. The condemnees, on the other hand, contend: first, that their leasehold interest is tantamount to complete ownership; and, secondly, that, even though the F.H.A. had the power to set rents, it could do so only in such a way as to guarantee the Wherry sponsor

[14] This propostion must, of course, be interpreted in the light of the facts of this case where the sales, though comparable, are far from identical. We do not mean to lay down any rule as to how many sales constitute the establishment of a market price. That will always ultimately depend upon the facts of the particular case and the characteristics of the market involved.

a fair return on the value of his property, and, therefore, that such a power in the F.H.A. could not diminish the value of the property.

As to the first ground urged by the Government, it seems clear that the condemnees must prevail. As pointed out above, both leases had in excess of sixty-five years yet to run as of the date of taking. Though the record indicates that it is entirely possible that the improvements here involved might outlast that period, the condemnees' interest is nevertheless not limited substantially by that fact. The present value of the Government's rights sixty-five years hence with respect to those improvements is negligible.[15]

In order to evaluate the contentions as to rent control, a brief survey of the background of these projects seems necessary. The projects were constructed under the aegis of the Wherry Act, which was enacted on August 8, 1949, in an attempt to relieve an acute shortage of housing which existed at that time at military installations throughout the country. The Act envisioned the construction of this needed housing by private builders and its provisions were consequently specifically designed to remove what appeared to its chief proponents to be the major impediments to such construction. The then current view of the problem was concisely expressed by Senator Wherry himself:

> "There are three requisites that must be provided in this legislation if it is to be successful: The program must be attractive to the builder or else you will get no construction; it must be attractive to the mortgage banker who supplies the money; the project must be made attractive to the Federal Housing Authority to enable it to set rental

[15] See Orgel, op.cit. supra, n. 4, at §122.

prices within the reach of families in the lower income brackets as well as in the higher brackets.'"[16]

The Wherry Act proposed to meet these requisites by providing for: (1) the elimination of land and acquisition costs by the leasing of land on military installations on long-term, irrevocable leases at nominal rentals; (2) a special form of mortgage insurance which avoided the problem created by the fact that ordinary F.H.A. mortgage insurance was unavailable because of the risk involved by reason of the location of the needed housing and the question as to the permanent nature of the military installations; and (3) F.H.A. control over the rents which could be charged for housing constructed under this plan.[17]

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[16] Quoted in S.Rep. No. 231, 85th Cong., 1st Sess., at p. 11.

[17] Insofar as the Wherry Act was designed to stimulate private construction of military housing, it was quite successful. Considerable amounts of such housing were erected on military installations throughout the country. In other aspects, however, the results of the program were less gratifying. Among the reasons for the dissatisfaction with the Wherry program were the following: (1) the probability of excessive profits in the early stages of the program; (2) the expected lack of sponsor interest in the later stages; (3) the fact that Wherry housing could not be assigned as "quarters" to military personnel; (4) the fact that the Wherry program permitted non-military personnel to live on military bases; and (5) the fact that movements of military personnel or the declining importance of military bases had led sometimes to high vacancy rates and frequent mortgage defaults. Review of Military Housing Programs, S.Rep. No. 231, p. 26, 85th Cong., 1st Sess., S.Rep. 404, p. 17, Cong.Doc.Ser. No. 11816; H.Rep. No. 913, p. 26, Cong.Doc.Ser. No. 11823, 84th Cong., 1st Sess. Consequently, on August 11, 1955, Congress enacted the Capehart Act, 69 Stat. 646 (1955), 42 U.S.C.A. § 1594, superseding the Wherry Act.

The Capehart Act provided that housing constructed on military installations after its enactment would be managed and operated by the Secretary of Defense instead of by the private builders as was the case under the Wherry Act. At the same time, it was provided that the Secretary of Defense could, in his discretion, acquire the existing Wherry housing projects. Where Capehart housing was

Considered in the light of the purposes of the Wherry Act, the proper resolution of the controversy seems clear. The condemnees' argument rests squarely upon a basic misconception of those purposes. For condemnees presuppose that the inducements offered by the Wherry Act to stimulate building, i.e., leases at nominal rentals and Government-insured mortgages, were outright gifts to the Wherry sponsors for which the Government would not, and, indeed, could not, exact a return.[18] Such is not the proper interpretation of that Act. These inducements were offered in return for low-cost housing. It is clear that the policy has consistently been one of allowing a return based upon original cost rather than reproduction. Rent increases were sanctioned only to offset rising operating costs and not to compensate for increased reproduction costs. The Act did not contemplate that sponsors would recover reproduction costs on a sharply rising market. And there was nothing unfair in its failure to do so. By insuring the mortgages on the projects, the Government assumed the risk of loss on a declining market. In such a situation, respect for the public interest prac-

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constructed at a military installation already being served by Wherry housing, acquisition of the Wherry housing was made mandatory. This latter provision was designed to protect Wherry sponsors from losses occasioned by competition with newer Capehart housing. The present case falls into this category, condemnation having been made necessary by the construction at Fort Benning of Capehart housing and the failure of negotiations between condemnees and the Government for a voluntary sale.

[18] It is this fact, i.e., the existence of the inducements, which completely distinguishes the Washington Market case, supra, n. 11, from the present case. The Washington Market Co. property was not subsidized as was that in this case. And, consequently, there were no limits upon the rents which the Company could charge for the property. Thus, the Washington Market case involves a situation where the requirement of complete ownership in the condemnee was met.

tically required that no benefit should accrue to the sponsors as a consequence of inflation.[19]

This conclusion is reinforced by the fact that the record is totally devoid of any unequivocal evidence that the project here involved would be reproduced by private investors at the risk of private capital. That reproduction would not occur under those circumstances in the vast majority of the cases is almost certain. Indeed, the Wherry Act was originally passed primarily because private investment was not providing such projects. We find nothing in the record to indicate that the situation at Fort Benning differs from this norm.

We conclude, therefore, that this is not a proper case for valuation on the basis of reproduction cost.[20] This means, of course, that the case must be tried on the basis of comparable sales, capitalization of income and original cost. Though it is apparent in a case such as this that the problem of valuation on the basis of these factors alone is a difficult one, that is unavoidable. The admission of reproduction cost evidence, though perhaps making it easier to reach *some* solution, only made the *proper* solution more difficult.

Since the case is to be tried again, we find it unnec-

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[19] This conclusion does not conflict with the holding of the Supreme Court in Offut Housing Co. v. Sarpy, 1956, 351 U.S. 253, relied upon by the condemnees. The Offut Housing case held merely that a Wherry sponsor was subject to taxation by the state in which his project was located on the basis of the full value of that project. That holding is entirely without bearing upon the question presented here, i.e., whether, and under what conditions, the value of such a project may be measured in terms of its current reproduction cost.

[20] We therefore find it unnecessary to pass upon the objections made by the Government to condemnees' showing with respect to depreciation. This question is not necessary for the success of this appeal and, in view of our holding, cannot arise again upon a second trial.

essary to comment upon many of the other errors urged by the Government. In the interest of sound judicial administration, however, it does seem wise to point out one error which occurred at the last trial and which might occur again. Over the Government's objection, the condemnees were permitted to introduce evidence related to a purported rent increase as to this housing which allegedly was instituted by the Government immediately after it took the projects. This purported increase was based upon the assignment of some of the housing to military personnel as Government quarters and the consequent forfeiture of the quarters allowance of such personnel. Such an arrangement does not constitute a rent increase in any proper sense and no testimony should have been admitted relating to it.[21]

REVERSED AND REMANDED.

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[21] This follows from the very nature of the quarters allowance given to military personnel. The allowance is the same throughout the country, like Government travel allowances, and varies, not according to space or type of property (house or apartment) occupied, but according to the rank and the dependency situation of the particular personnel involved. Thus, the allowance is totally unrelated to rental value. To hold otherwise, is to adopt the anomalous position that the very same apartment may have one rental value if occupied by a colonel and a far lesser value if occupied by a lieutenant.

U. S. GOVERNMENT PRINTING OFFICE 1960 847043